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EDUCATING ANTIRACIST LAWYERS:
THE RACE AND THE EQUAL PROTECTION OF THE LAWS PROGRAM

Dermot Groome¹

ABSTRACT

The year 2020 has forced us, as a nation, to recognize painful realities about systemic racism in our country and our legal system. The fallacies in our founding documents and the vestiges of our slave past are so woven into our national culture that they became hard to see except for those who suffered their daily indignities, hardships, and fears. As legal educators, we must face the role we have played in helping build the machinery of structural racism by supplying generation after generation of those who maintain that machinery and prosper within it. In this critical moment of our country's history, we, as legal educators, must train and prepare a generation of lawyers to once and for all complete the work of the Civil Rights Movement and purge what remains of racism from our legal system – to build better safeguards to ensure that all of us, everyone, has the equal protection of the laws promised by the 14th Amendment of our Constitution.

This article is one of three interdependent articles authored by Penn State Dickinson Law faculty and staff. These articles are meant to be read together to chart the vision and implementation for building an Antiracist law school and providing a template for an Antiracist legal academy and legal profession. This first article, Danielle Conway, Bekah Saidman-Krauss, and Rebecca Schreiber, “Building an Antiracist Law School: Inclusivity in Admissions and Retention of Diverse Students—Leadership Determines DEI Success” can be downloaded on from [SSRN](#). The third in this series is Amy Gaudion, “Exploring Race and Racism in the Law School Curriculum: an Administrator's View on Adopting an Anti-Racist Curriculum.”

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As educators, we must recognize our unique opportunity and important responsibility to combat racism in our educational mission. We must do more than transfer legal knowledge and skills to our students. We must cultivate within them, a principled, enduring commitment to work for true equality over the course of their careers and practice law in a way that promotes equal treatment of all. To do this we must reconsider not only what we teach, but how we teach it.

This essay sets out one possibility. It describes the Race and Equal Protection of the Laws program at Penn State Dickinson Law. This innovative program draws from Critical Theory and Critical Pedagogy to develop an educational approach with the objective of transforming how our students see their place and role in our evolving, flawed democracy. It incorporates the work of Critical Race Theory to help students understand the root causes of systemic racism and why the landmark decisions of the Civil Rights Movement have not realized their potential to change the lived experience of Blacks and people of Color. It adapts principles of Shared Praxis, an approach to teaching grounded in Critical Pedagogy that guides students to a deepening consciousness of the problem, explores with them sources of law and justice that can be brought to bear, and invites them to develop their own carefully considered response as law students and as lawyers.

During this yearlong course, students will learn and work as co-investigators with faculty members and other students to better understand the relationship between race and different areas of the law including housing, health care, criminal justice, democracy, capitalism and education.

EDUCATING ANTIRACISTS LAWYERS: THE RACE AND THE EQUAL PROTECTION OF THE LAWS PROGRAM

[Y]ou have received a great education. You must leave here and go out and get in the way. When you see something that is not right, not fair, not just, you must have the courage to stand up, to speak up and find a way to get in the way.

John Lewis (1940-2020)²

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Part I. Introduction

For over 400 years, the history and legacy of slavery has permeated the DNA of American life. In eight minutes in 2020, the curtain on this legacy of racial injustice was unflinchingly torn back in a way it had not been before.³ It has caused a reckoning for us as lawyers to accept that the profession we have devoted our lives to has been an essential component in the machinery of structural racism. As legal educators, we must face our role in building that machinery and supplying the generations of lawyers who maintain it, perpetuate it, and prosper within it.

On June 2, 2020, the Faculty of Penn State Dickinson Law unanimously adopted a resolution recognizing “the ongoing, systemic and perpetual racial and societal injustices in this

² Valerie Strauss, *The Prescient Commencement Speech Rep. John Lewis Gave In 2016*, WASHINGTON POST (Jan 16, 2017) <https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/16/the-prescient-commencement-speech-rep-john-lewis-gave-in-2016/>

³ Associated Press, *Prosecutors Say Officer had Knee on George Floyd’s Neck for 7:46 Rather than 8:46*, L.A. TIMES (Jun. 18, 2020), <https://www.latimes.com/world-nation/story/2020-06-18/derek-chauvin-had-knee-george-floyd-neck-746-rather-than-846>

country, which have been passed on from generation to generation.” The faculty jointly resolved that “we must never enable but should all be active antiracists in taking responsibility to condemn and to end” systemic racism wherever it exists.⁴ On June 18, 2020, the Faculty unanimously adopted another resolution entitled Race and Our Educational Mission, recognizing that the Faculty had “a unique opportunity and important responsibility to combat racism and inequality through its educational mission.”⁵ In this document, the Faculty resolved to develop an annual plan of anti-racist education throughout its curriculum; to develop co-curricular programming addressing structural racism; and to conduct a yearly assessment of the effectiveness of its efforts. Dickinson Law has incorporated antiracist education into its core educational mission, a commitment that “shall remain in effect until such time that the faculty deems, by resolution, that it is no longer necessary.”⁶ Other law schools have taken similar actions. For example, the deans of all ten law schools in Texas have committed: “to equip these future generations of attorneys with the ability to recognize injustice, including racial injustice – and the commitment to advocate for its eradication.”⁷

⁴ Penn State Dickinson Law School Faculty, Resolution (Jun. 2, 2020) <https://dickinsonlaw.psu.edu/dickinson-law-faculty-will-not-remain-silent-face-brutality>

The full paragraph setting out the resolute commitment of the faculty states:

NOW, THEREFORE, BE IT RESOLVED that the faculty acknowledges that racism is an affliction that we must never enable but should all be active antiracists in taking responsibility to condemn and to end, that we need to identify and challenge systemic prejudice wherever it exists, that we are all accountable for doing the work necessary for policy changes that dismantle structural systems of oppression that perpetuate racial inequities in our society, that we will strive to be better listeners and supporters of those who are the victims of racism, that we will never rest until every American feels safe, free and accepted in our country, and that we will continuously abide by the goal of providing respect and equal treatment to all in upholding the rule of law.

⁵ Penn State Dickinson Law School Faculty, Resolution (Jun. 18, 2020) <https://dickinsonlaw.psu.edu/sites/default/files/2020-07/Race-and-Our-Educational-Mission.pdf>

⁶ Dickinson Law Faculty Resolution (Jun. 18, 2020)

⁷ Brad Toben (Baylor), Michael Barry (South Texas), Patricia Roberts (St. Mary’s), Jennifer Collins (SMU Dedman), Robert Ahdieh (Texas A&M), Jack Nowlin (Texas Tech), Joan Bullock (Thurgood Marshall), Leonard Baynes (U. of Houston), Ward Farnsworth (U. of Texas), and Felicia Epps (UNT Dallas), *Statement of The Deans of The Ten Texas Law Schools Condemning Racism And Remembering George*

This fall, in keeping with the resolution, the faculty introduced a new, required course for all first-year students called Race and the Equal Protection of the Laws (“REPL”).⁸ This one credit, eight session course exams the relationship between race and our legal system and how the implementation of mostly race neutral laws have shaped and perpetuated structural racism in areas like: criminal justice, education, health care, housing, capitalism and in our democratic institutions. The final session of the course will redirect the focus of the discussion to the students themselves. We will ask students to begin the process of discerning what their response will be as lawyers in the current moment of our country’s history. We will challenge students to imagine how they, as lawyers, can dismantle systems of racism and encourage them to make a solemn, personal commitment to do so. A diverse group of over fifty, including faculty, staff, students, and alumni, have worked together to pool their knowledge, personal experiences and skills to develop a robust transformative program.

Recognizing the importance of role models to personal develop the program also shines a light on lawyers, past and present, who have used their skill and talent as lawyers to effect real change in our legal system and in the lived experience of Americans. For example, for the session on housing we invited Kate Walz, a senior litigator with the National Housing Project who is a “Movement Lawyer” working with groups in Chicago to address systemic racism in its housing practices.

The two resolutions of the Dickinson Law Faculty together recognize that our responsibility as legal educators is not simply to transfer legal knowledge and skills, but to “instill in students an abiding appreciation of, and eagerness to defend, the Equal Protection Clause of the 14th Amendment of the U.S. Constitution and to cultivate within students, a principled,

Floyd, (Jun. 10, 2020) <https://law.utexas.edu/news/2020/06/10/statement-of-the-deans-of-the-ten-texas-law-schools/>

⁸ Although the program is required for first-year students, upper level students and our candidates for Master’s and Doctorate degrees will also be able to attend. Some faculty are requiring students in their upper-level courses to attend specific sessions (*e.g.*, students enrolled in Business Entities are required by their professor to attend the session on Capitalism and Commercial Law).

The University of Chicago Law School offers a pre-orientation program to first year students that includes a lecture on Critical Race Theory. *See* <https://www.law.uchicago.edu/law-school-pre-orientation-program>

enduring commitment to work for true equality in our society over the course of their careers.”⁹
To do this, we must not only reconsider what we teach but how we teach it.

The rationale underlying the Equal Protection Clause can be simply stated as Constance Baker Motely did when she drafted the complaint for *Brown v. Board of Education* with Thurgood Marshall: “This case deals with inequalities imposed on individuals by the state, because of race. The Fourteenth Amendment was passed to abolish these inequalities.”¹⁰ Motely, known as the ‘Civil Rights Queen,’¹¹ secured James Meredith’s right to attend the University of Mississippi. She represented Dr. Martin Luther King Jr. and the Freedom Riders and, as the first Black woman to appear before the Supreme Court, won nine of the ten cases she argued.¹² Motely became the first Black woman to be appointed to the Federal Bench where she presided over many equal protection cases during her 36 years as a judge.¹³ It was as a judge that Motely struggled with the complexities of applying “the equal protection of the laws” its limited power to ensure real equality in the lived experience in the lives of Black and Brown people. She issues decisions that both surprised and disappointed civil rights lawyers.¹⁴

The five words of the clause derive their immense import from their brevity and unequivocal mandate – they correct the hypocrisy of our founders’ assertion that “all men are created equal.” In essence, the Equal Protection Clause is a call to, and a guarantee of, equality for all; a call for legal and social justice for all under the jurisdiction of the United States. The challenge before us as educators is to train lawyers so that they become agents for the promotion

⁹ Dickinson Law Faculty Resolution (Jun. 18, 2020).

¹⁰ *Brown v. Board of Education of Topeka Kansas*, 347 U.S. 483 (1954), (Complaint, Jul. 23, 1951), <https://www.docsteach.org/documents/document/complaint-in-brown-v-board-of-education-of-topeka>.

¹¹ Tomiko Brown-Nagin, *On Being First: Judge Constance Baker Motley and Social Activism in the American Century*, (speech, Aug. 18, 2016), <https://today.law.harvard.edu/tomiko-brown-nagin-constance-baker-motley-american-experience/>

¹² *Id.*

¹³ Tomiko Brown-Nagin, *Identity Matters: The Case of Judge Constance Baker Motely*, 117 COL. L. REV 7 (2020), <https://columbialawreview.org/content/identity-matters-the-case-of-judge-constance-baker-motley/#:~:text=This%20Essay%2C%20based%20on>

¹⁴ *Id.*

and protection of equality within our legal system. It is not enough to simply expect race neutral laws, but to train lawyers who are committed to interpret and apply those laws in a manner that ensures real equality in the lived experience of all.

This essay describes the first iteration of the REPL program. We will assess its successes and failures at the end of the academic year and adapt the improve the program in the coming so that we can best prepare our students for the difficult work ahead of them. Part II of this essay describes the teaching method known as Critical Pedagogy and considers how it can assist us in this work. Part III is an overview of how we structure each session of REPL and infuse it with the principles of Critical Pedagogy. Part IV is a summary of the eight sessions of the course and Part V offers some closing thoughts on this project.

Part II. Critical Pedagogy

Working with my Dickinson Law colleagues to develop Race and the Equal Protection of the Laws has caused us to consider the importance of the approach we use to teach our students about the Equal Protection Clause. In order to discharge our second resolution's mandate to "cultivate within students, a principled, enduring commitment to work for true equality in our society over the course of their careers," we must do more than provide information. We must engage them in considering how the 14th Amendment calls them to practice law in their particular area of interest – perhaps a lesson those who trained us were insufficiently attentive to. When our students take their oaths of admission to the bar, they must appreciate what their commitment to "support, obey and defend the Constitution of the United States" and the equal protection it guarantees requires of them each day of their legal careers. To do this, we have incorporated principles of Critical Pedagogy into the REPL course.

Critical Pedagogy, developed by Paulo Freire, is an educational theory that arose out of the social justice movements in South America in the 1960s. These movements, which paralleled our own Civil Rights Movement, sought to ameliorate the systemic injustices suffered by indigenous and historically oppressed peoples. Critical Pedagogy's essential insight is the idea

that a goal of education should be to create an “opportunity for students to be able to reflectively frame their own relationship to the ongoing project of an unfinished democracy.”¹⁵

In the 1980s, Thomas Groome, working in the field of religious education, took the secular educational principles of Critical Pedagogy and applied them in a structured teaching approach for religious educators. His Shared Christian Praxis Approach (“Shared Praxis”) has been used widely for over 40 years and throughout many cultures and contexts; it recognizes that the most effective way to teach a faith tradition is to do so in the context of the shared experience of that faith community. Further, that teaching of faith traditions should inform and help shape each person’s own response to the world and situation in which they find themselves. The REPL course takes the structured implementation of Critical Pedagogical principles as developed by Shared Praxis and adapts it to a secular study of the relationship between race and the law in order to help students shape their response to the world they will practice in.

Critical Pedagogy would call us as legal educators to include, in all our courses, an opportunity for students to reflect on our nation’s shared experience of that particular area of the law and help students “reflectively frame their own relationship” to it. Criminal law and criminal procedure courses fail students if they omit an examination of the law’s disparate impact on different communities. Courses on commercial law, housing law, health law, and education law should include meaningful engagement with students about our nation’s shared experience of the disparate impact of the law in these areas and encourage students to consider how the law might change and how they, as lawyers, might practice their profession in a way that promotes true equality. Coursework should not be insulated from what is happening in our country but fully immersed in it so that students not only learn settled principles of law but are assisted in forming their response as lawyers to it.

In light of recent events, our students, from this point forward, will be looking to us to help them make sense of the relationship between race and our legal system; to assist them in discerning how they might address these deeply rooted problems as lawyers. As educators, we must nurture their nascent intuitions of justice into life-long commitments. We must train them to be vigilant for inequalities in whatever corner of our legal system they ultimately work and prepare them to be guardians of true equality in all they do as lawyers.

¹⁵ HENRY A. GIROUX, ON CRITICAL PEDAGOGY (2020).

As lawyers, we each have our heroes in the profession; mine is Justice Robert Jackson. From his humble beginnings in a rural upstate New York town, and without a law degree, he, like Motely, was another of our great lawyers. He is the only lawyer to have held the positions of Solicitor General (1938-40), Attorney General (1940-41) and Associate Justice of the US Supreme Court (1941-1954). After World War II, he was the chief architect and lead prosecutor of the Nuremburg Trials.

When Jackson finished his work in Nuremberg in 1946, he returned to the Supreme Court, no doubt, a different person having seen the crimes of the Holocaust up close. He knew in detail how the law and the legal system was used as an instrument of oppression, persecution and ultimately genocide. He saw atrocities seeded by discriminatory laws and how those seeds germinated, in time, to become part of the machinery of the Holocaust. I saw this phenomenon as well during my work as a UN prosecutor in the International Criminal Tribunal for the former Yugoslavia (ICTY).¹⁶

A couple of years after Jackson's return to the Supreme Court, the court decided *Railway Express Agency Inc. et al v. People of the State of New York*, a case about who could and could not post advertising on the sides of buses in New York City. Within the utter triviality of bus advertising, Jackson recognized the existential importance of the equal protection clause of the Constitution. No doubt, his work at Nuremberg informed his concurring opinion in the case. New

¹⁶ In Bosnia and Herzegovina, the first indications of what was to come were prosecutors and judges applying the law in a way that discriminated against Muslims and other targeted groups. This treatment took many forms, such as the selective enforcement of criminal, commercial, housing and education law; different readings of statutes depending on the ethnicity of the litigants. Over time, the biased interpretation of the law gave way to laws, decrees, and regulations that were explicitly discriminatory in their text and effect. In time there was a comprehensive system, that: removed Muslims and non-Serbs from their jobs; imposed special registration requirements and mandated special identification documents for Muslims; denied Muslims access to their bank accounts, removed house phones, restricted their movement and subjected some Muslims to daily searches of their homes and persons. Together these culminated in a grave physical attack on the Muslim population involving crimes against humanity (persecution, murder, rape, forcible transfer, etc.) and in some cases genocide. *See, e.g., Prosecutor v. Ratko Mladić, Case no. IT-09-92, Judgment, Vol. II, ¶ 1422, et seq. (Int'l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017)* (Describing the persecutory legal regime established in the municipality of Prijedor, Bosnia and Herzegovina).

York State could decide whether or not to allow advertising on buses, but whatever it decided, it had to apply the law to everyone equally. In his concurrence Jackson wrote:

This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. ...Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.¹⁷

Jackson appreciated the important prophylaxis the 14th Amendment provides against our legal system being co-opted in the oppression or persecution of some of its citizens. Our students must leave our schools attentive to the potential our laws have to be misused to perpetuate injustice and inequality. They must go forward with a firm resolve to engage in the practice of law in a way that remains mindful of this potential, combats systemic racism and fosters equality. The REPL course endeavors to do this.

I do not suggest that there is only one way, or even a limited number of ways, for us as legal educators to train our students during these times.¹⁸ In fact, some will recognize as familiar some aspects of the approach below. Rather, this essay offers the following invitation to all legal educators, stirred by recent events: to develop a shared understanding of how our legal system contributes to systemic racism; to investigate its root causes; to reacquaint ourselves with how, at times, our laws, legal traditions and great lawyers have been agents of equality; to reconsider the relationship between social justice and legal education; and finally, to find a response as educators that meets the gravity of the moment. This essay considers aloud how employing principles of Critical Pedagogy to our task might make us more effective educators for racial justice at this moment in history.

¹⁷ *Railway Express Agency, Inc. et al. v. People of the State of New York*, 336 U.S. 106, 112 (1949) (Jackson, R, concurring).

¹⁸ Over 20 U.S. law schools offer courses on Critical Race Theory or on racial justice. Schools offering courses and seminars on Critical Race Theory include: Berkeley, Columbia, Duke, Georgetown, Harvard, NYU, Northwestern, Stanford, UCLA, U. of Conn, U. of Chicago, U. of Michigan, U. Penn, and Yale.

Paulo Freire was born in Brazil in 1921 and grew up in poverty. He attended law school and although he was admitted to the bar, he chose instead to teach secondary school in poor communities. While teaching literacy, Freire discovered that he could achieve better results when he taught students to become critically aware of social issues that impacted their lives.¹⁹ Beginning with some issue that was common among the peasant people of north-eastern Brazil where he was teaching literacy (e.g. need for decent housing), Freire discovered that they readily learned to read and spell the term (*casa*) when associated with their social need. This realization of the relationship between social consciousness and pedagogy led him to a careful study of the synergy between the two. Brazil's elites, threatened by a formerly silent and illiterate poor underclass who now could read and think about social issues, ended Freire's literacy program after a coup d'état by military leaders in 1964. Freire was imprisoned 70 days for treason before being released.

As an educator and philosopher, Freire thought deeply about the systemic inequality of Brazilian society and how education might address it. His most famous work, *Pedagogy of the Oppressed* sets out his understanding of the relationship between education and social change and how that informs the work of educators. Core to his theory is that educators must help students "develop their power to perceive critically the way they exist in the world with which and in which they find themselves; they come to see the world not as a static reality, but as a reality in progress, in transformation."²⁰ A student aware of their place in a reality capable of change by them, will, over time, discern their own role in that change. To Freire, the most effective way to nurture this process was not through a traditional pedagogy that "banked" information in the mind of students as if passive receptacles but through a Socratic-like dialogue with students. A give-and-take, not simply about a topic of interest, but about an epochal generative theme, an important contemporary social issue that needed to be addressed. Further, Freire proposed a dialogue in which its participants (instructor and student alike) engage each other as co-

¹⁹ In one of his experiments, Freire was able to teach 300 illiterate sugar can harvesters to read and write in 45 days.

²⁰ PAULO FRIERE, *PEDAGOGY OF THE OPPRESSED* 83 (50th anniv. ed. 2018). "A deepened consciousness of their situation leads people to apprehend that situation as a historical reality susceptible of transformation." *Id.* at 84.

investigators and critical thinkers in a reflective process, unmasking the reality and causes of their own oppression, and imagining how to make social change.²¹

If Freire were alive at this moment, he would undoubtedly see systemic racism as a social injustice to be addressed with Critical Pedagogy. He would surely favor a pedagogy that recognizes the shared (not same) lived experience of both those advantaged and disadvantaged by our legal system. He would propose to address injustice through a critically reflective dialogue between teacher and students about the relationship race and our legal system.²² The more active the conversation and collaboration, the deeper students' understanding will be. Freire calls this deeper shared understanding *conscientização*. Roughly translated, it is a critical consciousness that is disposed and determined to act for necessary change.²³ Through this process of

²¹ *Id.* at 92, *et seq.*

“[...T]rue dialogue cannot exist unless the dialoguers engage in critical thinking – thinking which discerns an indivisible solidarity between the world and the people and admits of no dichotomy between them – thinking which perceives reality as process, as transformation, rather than as a static entity – thinking which does not separate itself from action, but constantly immerses itself in temporality without fear of the risks involved. Critical thinking contrasts with naïve thinking, which sees “historical time as a weight, a stratification of the acquisitions and experiences of the past,” from which the present should emerge normalized and “well-behaved.”

FREIRE, *supra* note 20, at 92 (quoting PIERRE FURTER, *EDUCAÇÃO E VIDE* 26-27 (1966)).

²² *Id.* at 06.

Henry Giroux writes:

Freire was acutely aware that what makes critical pedagogy so dangerous to ideological fundamentalists, the ruling elites, religious extremists, and right-wing nationalists all over the world is that central to its very definition is the task of educating students to become critical agents who actively question and negotiate the relationships between theory and practice, critical analysis and common sense, and learning and social change. Critical pedagogy opens up a space where students should be able to come to terms with their own power as critically engaged citizens; it provides a sphere where the unconditional freedom to question and assert one's convictions is made central to the purpose of public schooling and higher education, if not democracy itself.

GIROUX, *supra* note 15, at 181.

²³ FREIRE, *supra* note 20, at 109. “Conscientização is the deepening of the attitude of awareness characteristic of all emergence.” *Id.*

investigation and reflection, “[h]umankind *emerge* from their *submersion* and acquire the ability to *intervene* in reality as it is unveiled.”²⁴

Is Critical Pedagogy relevant to our time and to our task as educators at this moment? In a book published last year, in a chapter entitled Critical Pedagogy in Dark Times, Henry A. Giroux, a Critical Pedagogy scholar, wrote:

It is hard to imagine a more urgent moment for making education central to politics. If we are going to develop a politics capable of awakening our critical, imaginative, and historical sensibilities, it is crucial for educators and others to develop a collective language of critique and possibility. Such a language is necessary to enable the conditions to forge a collective international resistance among educators, youth, workers, artists, and other cultural contributors in defense of public goods... In an age of social isolation, information overflow, a culture of immediacy, consumer glut, and spectacularized violence, it is all the more crucial to take seriously the notion that a democracy cannot exist or be defended without informed and critically engaged citizens.²⁵

Critical Pedagogy recognizes that a precondition to students becoming agents of social change is their making the connection between knowledge and critical awareness; this must be “buttressed by a profound desire to overcome injustice and a spirited commitment to social action.”²⁶

²⁴ *Id.* at 109 (*emphasis* in the original).

²⁵ GIROUX, *supra* note 15, at 219.

²⁶ *Id.* 224. Giroux goes further to say:

“[...] political education foregrounds education guided not by the imperatives of specialization and professionalism, but by goals designed to expand the possibilities of democracy. Linking education to modes of political agency is therefore part of a larger project to promote critical citizenship and address the ethnical imperative to alleviate human suffering.

Part III. Overview of REPL's Pedagogical Approach

During his doctoral studies in education Thomas Groome began to consider how the secular theory of Critical Pedagogy might be applied in his field of religious education. He was a student of Freire's work and eventually they became colleagues, co-teaching a graduate course in education.²⁷ Groome's first book, *Christian Religious Education*, published in 1980, introduced what he called the Shared Christian Praxis Approach to religious education.²⁸ Ten years later, he would publish *Sharing Faith*, the definitive statement of the Shared Praxis approach, an amalgam of the core principles of Critical Pedagogy and his own scholarly work in the field of religious education.²⁹

Shared Praxis divides each educational event into a series of five movements (*i.e.*, moving forward in a process). With its clear structure and organization, Shared Praxis allows those with varying levels of training to effectively employ Critical Pedagogy's principles. Shared Praxis is widely used today by both university professors and part-time Sunday school teachers; it has been adopted by Jewish and Islamic educators and has also been adapted for use in a number of secular fields. While Shared Praxis was developed for Groome's work in religious education, it is a sound method of instruction that incorporates Critical Pedagogy and is applicable to any field where the educator hopes to help students understand their full capacity to shape the world around them with a view towards justice for all.³⁰

²⁷ I became familiar with Freire's and Groome's work when I audited this course and attended a number of lectures while I was in law school. Thomas Groome is my uncle.

²⁸ THOMAS H. GROOME, *CHRISTIAN RELIGIOUS EDUCATION: SHARING OUR STORY AND VISION* (1980).

²⁹ THOMAS H. GROOME, *SHARING FAITH: A COMPREHENSIVE APPROACH TO RELIGIOUS EDUCATION AND PASTORAL MINISTRY* (1991). Groome most succinctly states Shared Praxis as "bringing life to faith and faith to life." See, Thomas Groome, *Understanding Shared Christian Practice* (interview, Jul. 16, 2018) <https://www.youtube.com/watch?v=DnWFKBR2Rhk>.

³⁰ Over the years, I have used an adapted version of Shared Praxis when training human rights investigators in Cambodia and lawyers in the former Yugoslavia. I have also used elements of it in my human rights seminar and for particular topics in criminal law such as the death penalty.

Understanding and adapting Critical Pedagogy and Shared Praxis for a law school setting can assist us in educating antiracist lawyers who can complete the work of the Civil Rights Movement. As a participatory approach of conversation and presentation rather than by didaction alone, Shared Praxis can help us better serve our students who find themselves wondering how they can be proactively antiracist, both as lawyers and ordinary citizens. All of the sessions in the REPL course have been designed by adapting the teaching methods of Critical Pedagogy and Shared Praxis. In addition to sharing knowledge about the relationship between race and our legal system we are serving as a catalyst for transformative personal reflections by students about their responsibility to fight racism as lawyers.

Overview of the Teaching Methods used in REPL

Our adaption of Critical Pedagogy and Shared Praxis uses a four-part structure for each of the sessions. Each part or component works together to guide students to a deeper understanding of an important issue and arms them with important knowledge about it.

Selecting a Generative Theme for Individual Classes

The first task in designing the REPL course was to identify the theme we would focus on in each of the eight sessions. To assist us, we looked to Freire's concept of the generative theme. Generative themes, as defined by Freire, are, by their very nature, important life issues that are likely to engage the interest of participants. According to Freire, a generative theme arises from the situation bounded by the time and place within which the student finds themselves. Groome describes the generative theme as, "some historical issue – question, value belief, concept, event, situation and so on – that is likely to draw participants into active engagement because it has import and meaning for their lives."³¹ There are race-related generative themes in many doctrinal law classes. What is the relationship between race, structural racism and: property law, contract law, criminal law, banking law, education law, health law, etc.? For this first iteration of the course, we selected seven generative themes related to race and our legal system. The last session will not focus on a generative theme *per se* but refocus students on their own discernment about the type of lawyer they will aspire to be. process.

³¹ GROOME, *supra* note 29, at 156.

Generative themes can exist in concentric circles moving from the general to the particular.³² The generative themes of our program will include both broad issues related to our entire legal system, as well as more focused examinations of particular areas of the law. In our first session, *Historic and Modern Privilegia*, we started with broadest focus possible, the outermost circle of possible themes by examining the foundational documents of our country and different laws that have created structural advantages for some and structural disadvantages for others. In Freirian terms we examined with a wide-angle of focus how our legal system impacts the daily lives of Americans differently, depending upon the color of their skin.

The next six sessions selected more focused generative themes. In these sessions we selected important areas of the law that have daily significant impacts on each of us. These generative themes (capitalism, criminal justice, housing, health care, education and democracy) are all important dimensions of American life and have meaning in the lives of students.

Element One: Turning our Attention to the Issue

Shared Praxis encourages educators to begin every educational session with a Focusing Activity. The Focusing Activity establishes the curriculum for the session around a generative theme. Here, the intent is twofold: a) to engage students as active participants in an interactive teaching/learning dynamic, and b) to focus students on the generative theme of the class. “The focusing activity turns people to their own ‘being’ in place and time, to their present praxis, and establishes a focus for the curriculum.”³³ The specific form the focusing activity can be broad as long as it effectively prepares students to engage with what will take place later in the session. The key is to establish the session’s theme as vital, urgent, and needing attention.

In REPL we use a two-part Focusing Activity. The first is the Playlist. One week before the actual session, students are sent a playlist of multi-media links to help them prepare for the session. These links have included podcasts, music videos, speeches, poetry readings, short

³² FREIRE, *supra* note 20, at 103.

³³ GROOME, *supra* note 29, at 146. Groome goes further:

Typically, it does this most effectively by engaging participants with shared focus in a generative theme for the teaching/learning event. It may do this by sponsoring a present action of it or by turning them toward some aspect of their historical reality in the world to recognize the theme as it is operative in present praxis.

Id. 146.

readings, and links to works of art. The items are selected to begin the process of engaging students with the theme, present them with perspectives of that theme that may be different from their own and begin the process of thinking about their lived experience with respect to that theme. In the session on Capitalism we included a link to a National Public Radio program that examined how Department of Agriculture policies forced many Black farmers from their land. For the Criminal Justice session we included a slam poem about a Black man talking to his nephew as the police approach his car. Students who listen to the Playlist arrive at the session prepared to thoughtfully immerse themselves in the issue.

The session starts with a Focusing Activity called “Turning our Attention to the Issue.” Rather than introduce the issue in lecture format, we introduce it with a compelling video or story that shifts students from their busy day to a sharp focus on the generative theme of the class. In our first session on *Historic and Modern Privilegia* our focusing activity was a six-minute film depicting young descendants of Frederick Douglass reading excerpts of “What to the Slave Is the Fourth of July,” a speech Douglass gave on July 5, 1852.³⁴ In *Race and Criminal Justice*, a second-year student described an encounter he and his brother had with police officers when he was eight-years-old.

Element Two: The Lesson

After the Turning our Attention to the Issue segment we move to the Lesson element. In this segment members of the faculty and upper-level students give a series of presentations designed to provide essential information about the generative theme. A session typically has five or six ten-minute sessions. Each is a concise exposition of the generative theme. In addition to providing important information about a specific aspect of the issue we endeavor to trace modern phenomena to the Antebellum period. For example, in the Capitalism session we began with a discussion of the slave market on Wall Street in the heart of our financial district, then moved to slave mortgages, the history of 40 acres and a mule, the New Deal, Redlining, and ended the lesson with a presentation on the impediments Black owned businesses faced when trying to access Payroll Protection Payments (PPP) during the Covid pandemic.

³⁴ See, NPR, *Frederick Douglass' Descendants Deliver His 'Fourth of July' Speech* (video: Jul. 3, 2020) <https://www.npr.org/2020/07/03/884832594/video-frederick-douglass-descendants-read-his-fourth-of-july-speech>.

Element Three: Small Group Discussions

After the Lesson segment is completed students are sent into small groups to discuss a prompt. The groups are made intentionally diverse and are moderated by a member of the faculty and an upper-level student. The primary role of these moderators is to help create a safe place to have complex and difficult discussions about race. We structure these discussions and provide prompts designed to two achieve two important goals of Critical Pedagogy: naming the generative theme and critical reflection on that theme.

Naming the Generative Theme

One of the objectives in the discussions is to engage students in a dialogue or activity designed to develop a shared common understanding of the issue – their “present praxis.” Groome writes, “[T]o engage people’s “present praxis” in a pedagogical event is to turn them to the consciousness that emerges from and the agency expressed in their whole way of “being” as “agent-subjects-in-relationship” in place and time, that is, to reflect on whatever is “being done” by them, from them, through them and is “going on” around them, to them, and to others in their sociocultural context.”³⁵ Freire describes the pedagogical intent here as enabling people to speak their own word, to “speak their truth” – as they see it.

Freire was convinced that only by people first “naming the world” can they begin to change it. During this element, the instructor recognizes the validity of the students’ experience of the world (in this instance, the ways in which our legal system has advantaged and/or disadvantaged them) and, in a dialogue with students, creates a shared understanding of the theme. This is not to say students will have a common shared experience of the law, just that they develop a shared understanding of the different experiences that they have each had. In the Housing Session students were encouraged to discuss their different lived experience of housing by them and their families and develop a shared understanding of race and housing that incorporates their different individual experiences. Participants are encouraged to express their own perception of their relationship to the issue, how they feel about it, and how it is reflected in their own unique socio-cultural context. Their expressions can be mediated through any form of communication (e.g., spoken/written word, art, quick “show of hands,” or a crowd poll app). “As

³⁵ GROOME, *supra* note 29, at 134.

people bring their conscious and historical engagement with a generative theme to expression – an aspect of their present praxis – they fulfill the intent of [this element].”³⁶

Critical Reflection

Once a relatively common understanding of the issue/problem is reached, we engage students in an activity designed to facilitate critical reflection on it. The goal here is to achieve a deeper understanding of the theme by examining it socio-culturally – in other words, contextually, historically, politically, economically, etc.³⁷ Critical reflection can engage reason, memory, and/or imagination, or any combination of them, and can be both personal and socio-cultural. This element “enables participants to come to a critical appropriation of present praxis in their “place” and “time” and metaphorically, to share in dialogue their own ‘stories’ and ‘visions’.”³⁸

In the context of *Historic and Modern Privilegia*, students were asked to reflect on whether or not the Constitution has lived up to the promises in its preamble. In *Race and Housing*, students were asked to develop a ten-year plan to encourage greater integration in the local community. By engaging them in a cooperative exercise they must necessarily draw from some of the material presented in The Lesson, reflect on the groups shared experience of race and housing and develop strategies designed to respond to generative theme in their particular time and place.

Students can be engaged in an examination of the history of our legal system (*i.e.*, The Constitution, the Fugitive Slave Acts, Jim Crow, voting laws, cash bail and excessive fines); the learned experiences of those impacted differently by our laws; and the biases/prejudices built into the architecture of our legal system. Moderators can pose the questions of the Critical Race theorists about why the promise of the Civil Rights Movement and its legal victories before the Supreme Court have not translated into fundamental changes to the lived experience of Blacks

³⁶ *Id.* at 147.

³⁷ Groome writes, “The intent is to deepen the reflective moment and bring participants to a critical consciousness of present praxis: its reasons, interests, assumptions, prejudices, and ideologies (reason); its sociohistorical and biographical sources (memory); its intended, likely, and preferred consequences (imagination). *See*, GROOME, *supra* note 29, at 147.

³⁸ *Id.*

and other people of color? Is it as Alan Freeman first suggested in 1978, that “in its core concept of the ‘violation,’ antidiscrimination law is hopelessly embedded in the perpetrator perspective?”³⁹ That is, it is largely indifferent to the lived experience of victims of inequality and sees its task as “merely to neutralize the inappropriate conduct of the perpetrator.”⁴⁰ What role did *Washington v. Davis* (concerning the equal protection component of the Due Process Clause) play in reordering the relationship between discriminatory effects and discriminatory intent and requiring that claimants establish the latter?⁴¹ As Aziz Huq has observed: “The granular ways of implementing grand, abstract ideas such as ‘discriminatory intent’ turn out to be highly consequential on the ground.”⁴² Or is it best explained by Derrick Bells’ interest-convergence theory that asserts that Black progress is only tolerated by the White majority when it aligns or convergences with a matter of White interest.⁴³

Although REPL does not attempt to comprehensively address Critical Race Theory (CRT), one of its objectives is to introduce its students to some core concepts and principles. We recognize that future iterations of the course might be improved by a more deliberate effort to help students become conversant in CRT concepts. In this first iteration, we have included a primer on CRT in one of the handouts and have invited two CRT scholars to give presentations to

³⁹ Alan Freeman, “*Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*,” 62 MINN. L. REV. 1049, 1053 (1978).

⁴⁰ *Id.*

⁴¹ *Washington v. Davis*, 426 U.S. 229, 240 (1976). In *Washington v. Davis*, the Supreme Court held that “the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”

For a discussion of the intent requirement on the Equal Protection Clause see Stephen Rhinehart, *Proving Intentional Discrimination in Equal Protection Cases: The Growing Burden of Proof in the Supreme Court*, 10 NYU Review of Law and Social Change 435 (1981); and *Id.* 1292.

⁴² Aziz Huq, “*What is Discriminatory Intent?*,” 103 CORNELL L. REV. 1211, 1291 (2018). Huq catalogues the definitional and practical difficulties that those claiming a violation of equal protection or establishment clause face.

⁴³ Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

students on education and health care from a CRT perspective. CRT has been engaged in critical reflection of race and our legal system for decades and its methods and the questions it poses serve to inform our choice of prompt and activities for the small group discussions.

Critical Race Theory

The CRT movement began in the 1970s recognizing that the advances made during the Civil Rights Movement had slowed, stopped, and in some respects “were being rolled back.”⁴⁴ The potential for improving the lived experience of Blacks contained in favorable precedents such as *Brown v. Board of Education* were diminished by lower court decisions that narrowed its implications, and through administrative and bureaucratic “slow rolling” of its mandate.⁴⁵ The

⁴⁴ RICHARD DELGADO AND JEAN STEFANCIC, *CRITICAL RACE THEORY* 3-4 (3d ed. 2018). Delgado summarizes Critical Race Theory as:

The critical race theory (CRT) movement is a collection of activists and scholars engaged in studying and transforming the relationship among race, racism, and power. The movement considers many of the same issues that conventional civil rights and ethnic studies discourses take up but places them in a broader perspective that includes economics, history, setting, group and self- interest, and emotions and the unconscious. Unlike traditional civil rights discourse, which stresses incrementalism and step- by- step progress, critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.

Over time, CRT principles and approaches have also been used in the study of the relationship between other identifiable groups and structures of power. These include: Asian Americans, Latinos, LGBT, Muslim, and Native Americans.

⁴⁵ DELGADO & STEFANCIC, *supra* note 44, at 5. *See also*, Bell, *supra* note 43, at 518.

See also, Mario L. Barnes, “*The More Things Change...: New Moves for Legitimizing Racial Discrimination in a “Post-Race” World*,” 100 MINN. L. REV. 2043, 2082 (2016):

The history of race relations in America is neither a narrative of undisturbed linear progress nor that of a stable phenomenon that remains unchanged. Slavery was followed by a period of de jure discrimination where formal exclusionary social practices during Reconstruction, such as Jim Crow and the Black Codes, ultimately resulted in racial segregation in most important areas of social life. Even though civil unrest, litigation victories, such as *Brown v. Board of Education*, and landmark civil rights legislation pared back formal methods of exclusion, racism continues to flourish [footnotes omitted].

legislative accomplishment of the Voting Rights Act of 1965 was made largely ineffective by the Supreme Court ruling in *Shelby County v. Holder*.⁴⁶

Early theorists such as Derrick Bell, Alan Freeman, and Richard Delgado challenged the triumphalist narrative of Civil Rights jurisprudence, adopting a more realistic assessment of its actual gains and positing the existence of the rise of less obvious, subtler forms of racism.⁴⁷ Bell attributed White self-interest to these advancements.⁴⁸ Freeman asserted that despite their apparent liberal thrust, the lasting impact of these cases was a legitimization of racism.⁴⁹ Some theorists asserted that the legal victories of the Civil Rights Movement, in fact, impeded social change through a process of co-optation, “a process by which the focus on legal reform narrows the cases, deradicalizes the agenda, legitimizes ongoing injustices, and diverts energies away from more effective and *transformative* alternatives.”⁵⁰ Critical Race Theory adopted and adapted

⁴⁶ *Shelby County, Alabama v. Holder, Attorney General, et al.*, 570 U.S. 529, 553 (2013). Chief Justice Roberts writing for the majority held that “Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”

Beginning in 2014, the Congress has tried several times to enact new legislation that updates the Voting Rights Act of 1965 and corrects the infirmities identified in *Shelby*. The most recent effort, The Voting Rights Advancement Act of 2019, has languished without being brought to the floor for a vote in the Senate. See Marianne Levine, *McConnell Won't Allow Vote on Election Reform Bill*, POLITICO (Mar. 6, 2019) <https://www.politico.com/story/2019/03/06/mcconnell-election-reform-bill-1207702>.

⁴⁷ DELGADO & STEFANCIC, *supra* note 44, at 4. Other principal figures using Critical Race Theory to investigate the lived experience of Blacks: Paul Butler, Devon Carbado, Kimberlé Crenshaw, Lani Guinier, Angela Harris, Cheryl Harris, Charles Lawrence, Mari Matsuda, Angela Onwuachi-Willig, and Patricia Williams.

⁴⁸ Bell, *supra* note 43.

⁴⁹ Freeman, *supra* note 39, at 1053.

⁵⁰ Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 939 (2007).

analytical methods and concepts used by scholars working in critical legal studies and radical feminism.⁵¹

The work of scholars in Critical Legal and Critical Race Theory provide an indispensable framework for any critical reflection with students on the generative theme, and the variety of thought in the field offers a number of perspectives from which to co-investigate a generative theme with students. While REPL course currently has modest teaching objectives with respect to CRT, we recognize that as the course evolves over the years we must train ourselves and our students in how to better understand the relationship between race and our legal system using the tools of CRT.

Critical Race theorists typically align themselves with one of two groups of theorists: idealists and realists. Idealists hold that racism is a function of thought and categorization – a social construction. Realists hold that racism consists of the societal structures that apportion benefits and burdens. Education, health care, housing, etc. are distributed according to a racial hierarchy.⁵² In *Race and Housing*, Kate Walz, a senior litigator with the National Housing Project did an expert job in showing how Chicago’s zoning laws and the Aldermanic Prerogative has perpetuated a hierarchical system of segregated housing that has spanned generations.

The view a particular CRT theorist holds will determine which solutions they find effective and ultimately propose. For idealists, effective solutions to address racism include: diversity training, speech codes, and positive media role models.⁵³ For realists, change requires structural changes to institutions such as the criminal justice system, unions, etc.⁵⁴ Within these broad categories of thought there are different themes that are a useful source for instructors designing a structured dialogue for critical reflection with their students. The major themes are described below.

⁵¹ DELGADO & STEFANCIC, *supra* note 44, at 4-5.

⁵² *Id.* at 7.

⁵³ *Id.* at 25.

⁵⁴ *Id.*

The Ordinariness of Racism

Racism is an ordinary part of America's social and power structures. Societal structures and our legal system routinely and systemically advantage Whites over Blacks and other non-Whites.⁵⁵ Its "ordinariness" cloaks it with an invisibility that makes it hard to address and allows it to persist within a legal system with facially neutral laws.⁵⁶ During the Group Discussion element moderators and students can work as co-investigators to better understand this phenomenon of structural racism's ordinariness and 'invisibility.' Were there aspects of the generative theme that they were not previously conscious of? Why was a student from the dominant group unable to see what may have always been clear to students of Color? Some feedback from both Black and White students suggests that the lessons coupled with group discussion have helped to see how our legal system helps advantage and disadvantage Americans based on race. They have an emerging understanding of phenomena that was previously unseen by them.

Racial Hierarchies and Interest-Convergence

Realists hold the view that racism is the system that American society uses to allocate benefits and burdens.⁵⁷ Blacks are only allowed to advance within American society when doing so converges with White self-interest (e.g., economic interests). Bell called this "interest-convergence."⁵⁸ Racism provides advantages to Whites and neutralizes incentives to eradicate

⁵⁵ Isabel Wilkerson likens these ordinary ubiquitous structures to a caste system not unlike other historical caste systems. See, ISABEL WILKERSON, *CASTE, THE ORIGINS OF OUR DISCONTENTS* (2020).

⁵⁶ *Id.* at 8.

Professor Mario L. Barnes, in an update to Alan Freeman's influential article, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine* (1978) writes that "the endorsement of America as truly post-race has freed up the [Supreme] Court to move beyond the issues Professor Freeman noted, toward an even stingier conception of equality." Barnes, *supra* note 47, at 2053.

⁵⁷ DELGADO & STEFANCIC, *supra* note 44, at 21.

⁵⁸ Bell writes:

"[T]his principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of

structural racism.⁵⁹ Does interest-convergence facilitate a deeper understanding of the generative theme? What is the White interest that is promoted through a perceived improvement to the lived experience of Blacks? Have traditionally White institutions of higher learning benefitted their own interests by giving greater access to Black students?

Interest convergence provides a powerful lens for students to critically reflect on important judicial decisions. Are watershed opinions best explained by interest convergence? Are inconsistent rulings better understood through the lens of interest convergence?

Race as a Social Construction

Idealists see the concept of race itself as a social construct disconnected from any objective biological, genetic or inherent basis. “Race” is a socially constructed category that is used to gain, manipulate and maintain power.⁶⁰ For example, the Jim Crow era “one-drop rule” that defined persons with a single African ancestor as “negro” irrespective of them being perceived as White by others.⁶¹ If attitudes of race are constructed then they can be deconstructed by identifying and changing the images, texts and social teachings used to construct them.⁶² What

whites...[T]he fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.

Bell, *supra* note 43, at 523.

⁵⁹ DELGADO & STEFANCIC, *supra* note 44, at 8.

⁶⁰ *Id.* See also, EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA (3d ed. 2009); and KIMBERLÉ CRENSHAW, NEIL GOTANDA, GARY PELLER & KENDALL THOMAS EDS., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995).

⁶¹ As the poet Langston Hughes wrote:

“You see, unfortunately, I am not black. There are lots of different kinds of blood in our family. But here in the United States, the word 'Negro' is used to mean anyone who has any Negro blood at all in his veins. In Africa, the word is more pure. It means *all* Negro, therefore *black*. I am brown.”

LANGSTON HUGHES, THE BIG SEA (1940), in ARNOLD RAMERSAD, ED., THE COLLECTED WORKS OF LANGSTON HUGHES Vol. 13, 36 (2001). See also, Neil Gotanda, *A Critique of Our Constitution is Color-Blind*, 44 STAN. L. REV. 1, 24 (1991).

⁶² DELGADO & STEFANCIC, *supra* note 44, at 20-21.

social constructions are involved in the generative theme? How have these messages shaped students' views of race and our legal system? How does our legal system reinforce these constructs? In *Race and Health Care*, we consider the case of a Black medical doctor who contracted Covid and was denied pain medicines she knew she needed because of biases on the part of the White hospitalist assigned to treat her.

Revisionist History

Some Critical Race idealists focus their lens on American history. Careful scrutiny of the widely accepted historical narrative can reveal inaccuracies that embed racist notions of non-whites in the dominant group. Older school texts and westerns are a good example of a historically inaccurate record glorifying White European's conquering of "savages" and omitting accurate historical facts such as the Trail of Tears. Revisionist history scrutinizes the American historical narrative comparing it with evidence of other contrary narratives. These scholars seek to "replac[e] comforting majoritarian interpretations of events with ones that square more accurately with minorities' experiences."⁶³ Dickinson Law is a few miles from the site of the Industrial Indian School of Carlisle (now the U.S. Army War College). The school was home to hundreds of native American children who were taken from their families in a systematic effort to strip them of their cultural identity and practices and reform them into a European-centric view of what an American citizen was. In *Race and Education*, we provided students with the information necessary to critically evaluate the school and its impact on native American families and communities. What historical narratives have played a role in the shared understanding of the generative theme? How might students' understanding of a phenomenon be different if the historical narrative was an accurate and balanced one reflecting the different perspectives of those involved?

Intersectionality

The concept of intersectionality recognizes that each individual is likely to hold a composite identity that aggregates the variety of physical and personality traits they may possess. A wealthy LGBT Black woman cannot be defined by reference to any one aspect of her personhood and sometimes different co-existing overlapping identities can come into conflict and

⁶³ *Id.*

implicate contradictory allegiances.⁶⁴ To the extent that the generative theme implicates issues of intersectionality these should also be explored. Questions that hypothetically consider a person's parsed out identities separately and are then contrasted with the lived experience of the individual can deepen an understanding of the impact of each identity as well as their combined impact. This first iteration of REPL has not incorporated a discussion of intersectionality. The faculty recognizes that in future years we need to incorporate the concept of intersectionality with intentionality. Discussions among some faculty on how best to do this have begun.

Critique of Liberalism

Many liberal thinkers would espouse equal treatment blind to contemporary effects from the legacy of slavery. They espouse equal treatment under the law without regard to personal history and situation. Chief Justice John Roberts exemplified liberal thinking when he wrote: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁶⁵ The statement fails to recognize that the legacy of slavery and systemic racism changes life's "starting line" and introduces inherent obstacles for Blacks. Critical Race Theory recognizes that equal treatment under the law in some cases may prevent new inequities but fails to address historic inequities in need of a remedy.⁶⁶ What does fairness require for Blacks, who in some situations still bear historical burdens? Is it possible to strike a balance that addresses historical inequities without creating new inequities for individual members of the dominant group? CRT theorists consider recent Supreme Court decisions that are intolerant of corrective

⁶⁴ DELGADO & STEFANCIC, *supra* note 44, at 10-11.

⁶⁵ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007).

⁶⁶ DELGADO & STEFANCIC, *supra* note 44, at 27. As Professor Crenshaw points out:

Race consciousness also reinforces whites' sense that American society is really meritocratic and thus helps prevent them from questioning the basic legitimacy of the free market. Believing both that Blacks are inferior and that the economy impartially rewards the superior over the inferior, whites see that most Blacks are indeed worse off than whites are, which reinforces their sense that the market is operating "fairly and impartially; those who should logically be on the bottom are on the bottom.

Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and*

Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1380 (1988).

race considerations simply as calcifying and preserving an inequitable system.⁶⁷ In several of the sessions the issue of reparations has been raised. In *Race and Capitalism* a 3L student demonstrated how wealth first generated through the exploitation of Blacks has remained in families with a slave owning past.

Sharing Critical Reflections

All of the small group prompts involve some activity that the students must engage in as a group and produce a single collective work product. This has included joint internet-type reviews, development plans, or advice to a client. Students upload these to a drop box so that can be shared with the rest of the class. In *Historical and Modern Privilegia*, we invited a groups to appoint a reporter to share the groups work in a plenary session. While this worked well and may be the ideal way of sharing critical reflections it was deemed unworkable over the entire course because of time constraints of a two-hour session.

Element Four: The Story and Vision

While the Small Group discussion is a collaborative process, in the Story and Vision segment a featured speaker takes center stage. In this element, the pedagogical task is to tell the story of how the law has, does, and can address the generative theme as now developed. For this element we invite a prominent lawyer or activist who can speak authoritatively on the subject. For example, Professor Deborah Archer, the new president of the ACLU will be the featured speaker for *Race and Democracy*.

The task of the featured speaker is to guide students with clarity and accuracy through the ways our laws have and can be brought to bear to address inequality. During the Story and Vision element, students should be “awakened” to the power of the law to address inequality. Their understanding of the relationship between the issue and the relevant law should deepen, seeing the law as a powerful tool to combat inequality.

The story of the law also includes a candid retelling of its failures, where it has fallen short of ensuring equality or when it has been an accomplice in the oppression of Blacks and people of Color. Again, the sources of law and justice from which the instructor may draw are varied.

⁶⁷ DELGADO & STEFANCIC, *supra* note 44, at 27.

Featured speakers are encouraged to share their vision for how we as lawyers and the law itself can be used for change. In *Race and Housing*, Kate Walz, spoke to students about “Movement Lawyering” and how she seeks to use her skills as a lawyer to supplement, support and advance constructive social movements working for greater equality. Dean Conway, in her address to students spoke of a “new era of Reconstruction” in which lawyers must reimagine their roles to pierce through dualities embedded within the American legal system.

The Story and Vision segment, presents students with an explicit invitation to consider the implications of what they have learned so far for their own lives, their lives now as law students, and their lives ultimately as lawyers. This element asks students to consider how their emerging understanding of the law calls them to act differently, to see themselves differently, to see those they interact with differently – all toward greater equality and justice. It is an opportunity to make decisions about how they will engage the world in their unique time and place, using their personal talents and legal training to address more forcefully and equitably the issue presented in the generative theme. What is their response as a lawyer to the issue? What will they do to promote greater justice and equality? Their response can be “primarily or variously cognitive, affective, and behavioral and may pertain to the personal, interpersonal, or sociopolitical levels of their lives.”⁶⁸

Students’ responses must be unique to the individual student and encourage personal actions and commitments to change their current behavior into behavior that promotes greater equality. Ideally, the session will embed a vigilance for inequality that students might have not previously seen, and a sense of obligation to address them as a lawyer.

At the start of the year, students were provided with a reflection sheet, a diary-type form where they could record their impressions and thoughts regarding the individual sessions as well as their emerging sense of what kind of lawyer they want to be. They are encouraged to be honest and detailed in this document and assured that they will never be required to share it. This inward-looking discernment process discernment will culminate in the last session of the course. During this session students, will be asked to write a short reflection paper and invited to choose a faculty member of the REPL team to discuss their evolving identity as a lawyer and their aspirations for their career.

⁶⁸ *Id.* at 148.

Decisions about actions and responses can also be collective. The law school community may develop a collective response that impacts the school itself or its surrounding community. Students might decide to join local community boards or to start a voter registration campaign.

The Handout

Each session is accompanied by a Handout. The handout is not the typical handout an instructor might prepare for a class. The handouts include original essays and reprinted excerpts. They are more akin to a book chapter and serve greater objectives than a class handout. Their first excerpt is to supplement The Lesson segment of the session. As previously described, The Lesson segment includes a series of short concise expositions on some aspect of the theme. Most of the presenters prepare original essays which supplement their presentation. These essays describe their main points in greater detail and include citations and additional resources to help interested students explore the particular topic in greater detail.

The Handout also provides students with relevant case law, excerpted articles, book chapters, historic speeches and other materials designed to facilitate a deep, thoughtful exploration of the generative theme. There is no expectation that the students read the entire Handout prior to the session. It is our hope that they will keep it and return to it in the future to continue learning about these issues and considering their response as lawyers.

Part IV. Summary of the REPL Sessions

Session 1: Historic and Modern Privilegia

The first session of the program, Historic and Modern Privilegia, provided an overview of how our legal system has created disadvantages for some groups and advantages for others throughout our history. The term *Privilegia* is from Roman Law. The Second Edition of Black's Law Dictionary defines a Privilegium as: "A special constitution by which the Roman emperor conferred on some single person some anomalous or irregular right, or imposed upon some single person some anomalous or irregular obligation, or inflicted on some single person some anomalous or irregular punishment."⁶⁹ The word is used in this context is to describe those aspects of our overall legal system that create systemic advantages and disadvantages based on race.

A week prior to the session, students receive a playlist with suggestions regarding material they can listen to or watch in preparation for the upcoming topic. For this first session, the playlist included, *inter alia*, a public address by Chief Justice Cheri Beasley of the North Carolina Supreme Court addressing the killing of George Floyd;⁷⁰ a podcast by Ibram Kendi;⁷¹ the Seven Stages of Grief, by UN Goodwill Ambassador and Slam poet, Emi Hamoud;⁷² and Billie Holiday's Strange Fruit.⁷³

We chose for our "Turning our Attention to the Issue" segment, a seven-minute video of the descendants of Frederick Douglass reciting excerpts from one of his most well-known

⁶⁹ *Privilegium*, Black's Law Dictionary (2nd ed. 1910). Depending upon their impact on the individual, *Privilegia* were characterized as either "favorable" or "odious."

⁷⁰ Chief Justice Cheri Beasley, *Special Announcement*, FACEBOOK (June 2, 2020), <https://www.facebook.com/NCcourts/videos/chief-justice-beasley-june-2-2020-special-announcement/251903529564824/>.

⁷¹ Ibram Kendi, *No in Between*, WBUR (June 5, 2020), <https://www.wbur.org/artery/2020/06/05/podcasts-to-listen-to-about-race-america>.

⁷² Emi Mahoud, *The Seven Stages of Grief*, INSTAGRAM (June 18, 2020), https://www.instagram.com/tv/CBkGw_fgsh/.

⁷³ Billie Holiday, *Strange Fruit* (Commodore Record 1939). Available at: <https://www.youtube.com/watch?v=Web007rzSOI>.

speeches, “What, to the Slave, is The Fourth of July?”⁷⁴ The speech, given in 1852 during Independence Day celebrations, is an unvarnished statement about how Black Americans see the Fourth of July – not as a day to celebrate independence, but as a day to remember the injustices of enslavement. The video was created by National Public Radio, with the assistance of young adults and teens descended from Douglass who recite the speech. The continued relevance of the words contained in the speech is clear, and they spotlight the lack of progress made over the last 169 years.⁷⁵ Alexa Anne Watson, the 19-year-old, 3rd great-granddaughter of Douglass begins the recitation along with 4 other descendants of Douglass, the youngest being 12 years old. The following are excerpts from the speech:

Fellow-citizens, pardon me, allow me to ask, why am I called upon to speak here to-day? What have I, or those I represent, to do with your national independence? Are the great principles of political freedom and of natural justice, embodied in that Declaration of Independence, extended to us?

...

I am not included within the pale of this glorious anniversary! Your high independence only reveals the immeasurable distance between us. The blessings in which you, this day, rejoice, are not enjoyed in common. The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought life and healing to you, has brought stripes and death to me. This Fourth of July is yours, not mine. You may rejoice, I must mourn.

After the recitation, there is a Coda in which Douglass’ descendants are invited to share their reflections on what his speech means for our time. Douglass Washington Morris II, a fourth-generation grandson of Douglass, with a look of despair, says:

⁷⁴ Frederick Douglass, Address to the Rochester Ladies' Anti-Slavery Society: What, to the Slave, if The Fourth of July? (July 5, 1982). The entire speech is available at, Black Past, <https://www.blackpast.org/african-american-history/speeches-african-american-history/1852-frederick-douglass-what-slave-fourth-july/>.

⁷⁵ *Frederic Douglass’ Descendants Deliver His ‘Fourth of July’ Speech*, NPR (Jul. 3, 2020), <https://www.npr.org/2020/07/03/884832594/video-frederick-douglass-descendants-read-his-fourth-of-july-speech>.

This is so extremely relevant with today's protests. He had a lot of hope especially for his age I'm getting to the point in my life, I'm only 20 years old but I'm exhausted. Like I have these thoughts like, will we ever really get to this point?' or is this really something that we should actually spend our time fighting for?

Isidore Dharma Douglass Skinner, the 15-year-old, 4th grandchild of Douglass concludes the reflection with words of hope:

Someone once said that pessimism is a tool of white oppression. I think that is true. I think in many ways we are still slaves to the notion that it will never get better. But I think that there is hope and I think that it's important that we celebrate black joy and black life and we remember that change is possible, change is probable, and that there's hope.







The Lesson portion of the program included seven five-to-seven-minute presentations tracing our history and how our laws have created, and maintain, a system of structural advantage and disadvantage based on race. Professor Stan Brand, began with a careful examination of our Constitution and how the US Supreme Court relied on its text to find that enslaved Blacks were, by definition, not citizens entitled to the protections and benefits of our Constitution. Professor Brand made the point that "no honest treatment of the subject of racial equality and justice under the law can proceed without acknowledging and understanding the textual basis established in our Constitution." Brand concluded that the implications of our founding text "must be included in the discussion [of our legal system], not as a historical footnote, but as an exegesis for our continuing struggle." Samantha Jacques, a third-year student, continued the examination of our Constitution by examining how Article IV, Section 2, Clause 3 - the Fugitive Slave Clause - was the legal basis of the Fugitive Slave Acts of 1793 and 1850. The 1850 law imposed an obligation on all Americans to enforce the institution of slavery by enacting criminal sanctions on anyone aiding an escaped slave. During her presentation she told the account of Robert Morris, a Black lawyer in Boston who fought to prevent Blacks from being re-enslaved in the South.

Pennsylvania has enjoyed the characterization as an abolitionist state. Ryan Marr, a 2L student, took a closer look at the Quaker State's relationship to slavery. He described how the Pennsylvania Act of 1780 for the Gradual Abolition of Slavery did not free any of the approximately 6,000 enslaved people in the Commonwealth. The law instead mandated that children born into bondage be released only after they completed 28 years work for their owners.

Similarly, Professor Thomas Place addressed the common misperception that the Emancipation Proclamation (1863) ended slavery. Place pointed out that the Emancipation Proclamation only applied to the southern states in rebellion and not to the remainder of the Union. Therefore, over 800,000 people continued to be enslaved in the border states and in areas occupied by the Union Army. Place described how slavery would continue until abolitionists, joined by suffragettes, successfully advocated for the passage of the 13th and 14th Amendments.

The Lesson then turned to the period of Reconstruction. Michaela Burgess, a third-year student, gave a presentation on the Black Codes and Jim Crow Laws. Professor Gary Gildin, who has brought cases on behalf of the ACLU – including before the Supreme Court – gave an overview of how systemic discrimination in voting laws, meant to guarantee one of our most fundamental rights, have denied and suppressed the voting rights of Black Americans. He explained the

Voting Rights Act of 1965 and how the Supreme Court's decision in *Shelby County vs. Holder* (2013) eroded many of the fundamental protections of the Voting Rights Act. Professor Raff Donelson, whose doctrinal work focuses on constitutional protections within the criminal justice system, presented on the disparate impact of cash

 PennState Dickinson Law		RACE AND THE EQUAL PROTECTION OF THE LAWS SESSION 1, HISTORIC AND MODERN PRIVILEGE	
<i>Instructions: The group will collectively draft a review of our legal system. Use this task to prompt discussions about our legal system.</i>			
 <p>Great For: Individuals it was originally written for</p> <p>United States Supreme Court</p>		United States Legal System Has formed a "more perfect union" "insure[s] domestic tranquility" "Promote[s] the general Welfare." "Secure the Blessings of Liberty to ourselves and our Posterity" U.S. Constitution	
		OVERALL RATING 	1 
<i>Rate our legal system using the following criteria</i>		 Liked: Checks and balances, principles of life, liberty, happiness, amendments can be repealed	
2.5/5 Creates a more perfect union	 Disliked: Not living up to the standards we set, inequality, amendments can be repealed		
2/5 Preserves domestic tranquility	<i>Describe group's assessment of our legal system.</i> The overall ideals that have been set are admirable, but they have not lived up to their standards. We each have different lived experiences, but we can all recognize that the ideals set out were positive. There just needs to be more work to make sure they are attainable for everyone.		
2/5 Promotes General Welfare	<i>What are the root causes of any problems you describe?</i> There has been a "Religious-like" view of the constitution for so long. The original document has been so revered that people fear addressing any issues as they arise. It was meant to be a "living, breathing document," but it is not currently behaving as such. We are also losing touch with separation of church and state. Morality differs among individuals and it can create a variety of different issues.		
2.5/5 Has secured the "Blessings of Liberty" for the descendants of the Framers	<i>What needs to be done to correct these problems?</i> The first step to correcting issues is addressing that they are present. So many policies are not concerning on their face, but are once the veil is lifted. Addressing the fact that things are in need of repair will allow us to start the process of change.		
1/5 Laws facilitating structural racism easily corrected.	We also all agree that the system itself needs to reflect the rule "treat others the way you want to be treated."		
2/5 Best legal system possible			

Above is an example of the internet-type review of one of the student groups.

bail and targeted fines. Using recent data, he made a compelling argument as how these features of the justice system created odious and ever-deepening challenges to Black Americans caught up in the justice system.

During the Small Group Discussion segment of the program, we asked students to discuss the presentations and then write an internet-type review of our legal system. To this end, we provided them with a form modeled after an Airbnb review to complete.

The featured speaker of The Story and Vision segment was the Dean of Dickinson Law, Professor Danielle Conway. Her presentation, entitled “The Duality Between What We Know and What We Should Know About Democracy, Law and the Legal System in America”, addressed the embedded duality in our legal system. A duality that is marked by utilitarian approaches to interpreting and applying the law that do not appropriately recognize the role of conscience and morality. She used the Fugitive Slave Act of 1850 as an example of how the blind application of the law, unbounded by conscience and morality, resulted in the commission of grave crimes against free Black Americans. The Act incentivized Federal Commissioners, charged with determining whether or not a Black person was a free citizen, to make determinations that forced many free and freed Americans into enslavement.

She described one particular case where a free citizen of nearby Harrisburg was arrested and given over to a southern slave owner pursuant to the Act. It would take the payment of a “ransom” by the community to secure his return.

Dean Conway called for a “new era of Reconstruction”, where we as lawyers would acknowledge the persistent dualities in our legal system and “harken” to do what we are called to do as lawyers for the most vulnerable in society. “We have the platform. The law is a lawyer-driven process – we know the levers to pull in the process” to ensure our legal system creates true equality in the lived experience of all Americans.

The accompanying Handout followed a similar format to the session. The Turning Our Attention to the Issue began with John Lewis’ last letter, a letter to his fellow citizens and published on the day of his funeral. In “Together You Can Redeem the Soul of Our Nation”, Lewis gave his final reflections on the issue of race and his hope in the face of the country’s

response to the killing of George Floyd.⁷⁶ This section also included a letter by Judge Bernette Joshua Johnson, Chief Justice of the Supreme Court of Louisiana, to her colleagues. In the letter, she shares her reflections on being a Black judge in a system that has perpetrated inequality for so many Black Americans, reminding her colleagues “that laws are not the same as justice.”

The Handout includes essays written by the presenters which more fully set out their presentations and the underlying sources. In addition to these, the Lesson section includes a reprint of the *Dred Scott v. Sanford* (1857) decision by the Supreme Court.

The section of the Handout devoted to critical reflection begins with Justice Harlan’s dissent in the *Plessy v. Ferguson* (1896) case. It continues the excerpt from Dr. Martin Luther King Jr.’s Letter from Birmingham Jail where he addresses how to distinguish between just and unjust laws; how, “sometimes a law is just on its face and unjust in its application.”⁷⁷ John Greiner, a Dickinson Law student, wrote an essay explaining W.E.B. Du Bois’ concept of Double Consciousness and the Veil.⁷⁸

The Story and Vision segment of the Handout began with an essay by Dean Conway on which she based her remarks. It was followed by a passage from Dr. Martin Luther King Jr.’s “Where Do We Go From Here: Chaos or Community?” In this, Dr. King’s last book, he sets forth his vision for how we as a country can make progress towards racial justice and equality. He points to the inability of Americans to sustain progress towards racial equality over the long term. Bursts of changes to our laws in response to Selma or Birmingham eventually are overcome by apathy where “the recording of the law in itself is treated as the reality of the reform.”⁷⁹

⁷⁶ John Lewis, Together, You Can Redeem the Soul of Our Nation, N.Y. TIMES, July 30, 2020.

⁷⁷ Dr. Martin Luther King Jr., Letter from Birmingham Jail (Apr. 16, 1963)

⁷⁸ Du Bois wrote, ““One feels his twoness, - an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.” See, W.E.B. Du Bois, Strivings of the Negro People, THE ATLANTIC (Aug. 1897). Available at: <https://bit.ly/3IYYsWf>; also <https://perma.cc/3P4W-9YMC>.

⁷⁹ Dr. Martin Luther King Jr., Where Do We Go From Here: Chaos or Community p. ?? (Beacon Press 1963).

Session 2: Race and Capitalism

The second session of the program focused on the intersection of race and our system of American capitalism. As with all sessions in the program, we set out to trace the institution of slavery and its relationship to capitalism and follow that history into the present. This session's playlist included the last speech of Dr. Martin Luther King Jr. on April 3, 1968, given in Memphis the day before he was assassinated.⁸⁰ The list included several contemporary music performances addressing inequality and exploitation.⁸¹ The Playlist had a link to an episode of the 1619 podcast, which dealt with the systemic impediments to the ownership of property by Black families going back to the promise of "40 acres and a mule" that was ultimately reneged upon.⁸²

On the night of the session, we turned our attention to the issue of race and capitalism with the video of an interview of Atlantic journalist Vann Newkirk about his research into how Black farmers were systematically forced off their land through the discriminatory practices of the US Department of Agriculture. The eight-minute video summarizes how discriminatory approval and distribution of farming loans worked to force Black farmers to sell their land to their White neighbors at prices that were grossly under market.⁸³

⁸⁰ Dr. Martin Luther King Jr., Address at the Mason Temple in Memphis, TN (Apr. 3, 1968). Available at: <https://www.youtube.com/watch?v=zgVrlx68v-0>.

⁸¹ These performances included: Trey Songz, 2020 Riots: How Many Times (Atlantic Records 2020)(Available at: <https://www.youtube.com/watch?v=DWZkjXCU-ds>); Rhiannon Giddens, At the Purchaser's Option (Nonesuch Records 2017)(Available at: <https://www.youtube.com/watch?app=desktop&v=6vy9xTS0QxM>); Alicia Keys, Queen of the Field (Patsey's Song) (Columbia Records)(Available at: <https://www.youtube.com/watch?v=MLut9VljbI0>); and Pharell Williams and Jay-Z, Entrepreneur (Sony Music Entertainment 2020)(Available at: <https://www.youtube.com/watch?v=bTOoY5MIkvM>).

⁸² Nikole Hannah Jones, 1619 Project Episode 5: The Land of Our Fathers, Part I, N.Y. TIMES (2019), <https://www.nytimes.com/2019/10/04/podcasts/1619-slavery-sugar-farm-land.html>.

⁸³ John Yang, How Southern Black Farmers Were Forced from Their Land, and Their Heritage, an interview with Vann Newkirk, PBS NEWS HOUR (Aug. 13, 2019), <https://www.pbs.org/newshour/show/how-southern-black-farmers-were-forced-from-their-land-and-their-heritage>.

Professor Dermot Groome introduced the session with a short history of the development of the financial district of Manhattan as the financial capital of the U.S. and the world. He identified the location of New York City's slave market on Wall Street, where slaves were not only bought and sold, but leased out for short periods of work for the benefit of their owners. Groome pointed out that Wall Street itself was named after a wall built by enslaved Africans.

Professor Mohamed Badissy, a specialist in energy and climate financing, taught students the basics of collateralizing debt obligations to show how this modern financial instrument had deep roots in our slave past. In our early history, slave mortgages were an important and attractive financial instrument for investors. It was difficult to secure loans with land or crop mortgages. Land was an inexhaustible and inexpensive commodity, and the value of future crops yields was too unpredictable. Slaves, however, were a prime valuable asset that held their value and could be used to secure debt. This collateralization of human life was not limited to southern investors; abolitionist-minded northerners and European investors looked at slave mortgages as an attractive and safe investment. Slave owners could "bundle" slaves of different genders and ages into asset pools that could then be used to secure loans. The loan could then be used to buy more slaves, which were subsequently pooled to secure new loans. This dependable mechanism for creating wealth helped slave owners exploit their slaves in ways far beyond their already-exploited labor.

Kendra Eden, a 3L student, addressed General Sherman's promise to slaves of "40 acres and a mule" and President Andrew Johnson subsequent withdrawal of that promise. Ryan Marr examined F.D.R.'s New Deal and contrasted how it helped lift many White Americans onto a path of financial security and home ownership while embedding racial segregation in communities and creating a system of coerced ghettoization of the Black community. Another 3L student, Samantha Jacques, spoke about how slave-owning families were able to hold onto and bequeath the wealth earned by the exploitation of enslaved peoples through the generations since slavery. She talked about the long-term financial consequences of the legal impediments that prevented freed Blacks from receiving patents for their discoveries and inventions. Particularly, she spotlighted the inability of Nathan Green and his progeny to receive any benefit from his development of a recipe for bourbon whiskey – known famously today as Jack Daniels.

Professor Samantha Prince, who does extensive work with small entrepreneurs, addressed the inequities of the Payroll Protection Program (PPP) designed to help such entrepreneurs survive the pandemic. Prince then spoke more broadly about the systemic challenges Black entrepreneurs have in accessing capital. Deborah Osborn, a 3L student, addressed such

impediments in the context of agriculture, and Professor Laura Williams addressed the inaccessibility of home mortgages for many Black families.

For the small group discussion students were presented with a hypothetical scenario in which they represented a White client in a contract negotiation with a Black entrepreneur. In the scenario, they identified a way that their client could exploit the structural disadvantages that the Black entrepreneur faced in accessing capital. Their task was to discuss their obligation, as attorneys, and whether they could or should advise their client to exploit structural racism to gain an advantage. The prompt precipitated a robust discussion and several of the groups felt that codes of professional conduct should directly address situations similar to this.

The featured speaker for the Story and Vision segment of the program was Mr. Karl Singleton, the President and founder of the Pennsylvania Diversity Coalition – an organization established to help minority business owners access capital and bid on publicly tendered contracts. The coalition also helps minority business owners develop their skills and talents. Mr. Singleton addressed the Covid pandemic and the difficulties that Black business owners face in accessing PPP loans. Banks that had welcomed the business that Blacks brought into the bank were suddenly confronted by resistance when it came to applying for PPP loans. He challenged students to reconceptualize their roles as lawyers, imploring them to respond to the racial inequities they would undoubtedly encounter with fidelity to the principles of equal treatment under the law. He invited students to work with his organization on projects to help Black-owned business compete on a level playing field.

The Capitalism Handout supplemented the session. It began with an article in which a number of people share their stories of trying to access banking services as Black men. One bank even called the police when one man tried to cash his paycheck. The Dickinson Law presenters each supplemented their presentation with a more detailed essay that included footnotes and suggestions for additional resources for students. The Handout included detailed reporting by David Leonhart from the New York Times and his investigation of the wealth gap between Black and White families from the 1950s to today.⁸⁴

⁸⁴ David Leonhart, The Black and White Gap is as Big as it was in 1950, N.Y. TIMES (June 25, 2020). Available at: <https://www.nytimes.com/2020/06/25/opinion/sunday/race-wage-gap.html>.

One of the objectives of the program is to introduce students to the field of Critical Race Theory and provide them with the knowledge and skills they will need to recognize structural racism and develop strategies as lawyers to combat it. We began this process in this handout in which we introduced students to the work of Derrick Bell, Richard Delgado, Lani Guinier, Angela Harris, Angela Onwuachi-Willig, Patricia Williams and others. While the program is not designed to provide in-depth coverage of CRT, it values introducing students to concepts like interest-convergence, racial hierarchies and intersectionality.

In an effort to create an academic environment where all ideas can be discussed vigorously yet respectfully, the handout included a critique of the New York Times 1619 project and asserted several inaccuracies in the work.

Session 3: Race and Criminal Justice

The pre-session Playlist included a series of podcasts, interviews and media items, related to policing, the criminal justice system and American prisons.⁸⁵ One short video depicted Black parents discussing “the talk” they give to their children regarding how they should interact with police officers.⁸⁶

For our Turning our Attention to the Issue segment of the program, a Black second-year student volunteered to talk about an encounter he had with the police when he was 8-years-old. Shortly after moving to a new neighborhood in Queens, NY with his family, he and his older

⁸⁵ These included: A BBC article entitled Former Prisoner Fighting for US Criminal Justice Reform (Sept. 10, 2020)(Available at: <https://www.bbc.com/news/av/world-us-canada-54105476>); An “Opening Statement” given by Paul Butler, Professor at Georgetown Law, in the “trial” of officers who killed Breonna Taylor (Available at: <https://twitter.com/georgetownlaw/status/1299338177866616833?lang=en>); A slam poem by Javon Johnson, “Cuz he’s Black” (2013)(Available at: https://www.youtube.com/watch?v=u9Wf8y_5Yn4); Jarrett Adams, Wrongfully Convicted at 17, Discusses Criminal Justice System (Available at: <https://www.youtube.com/watch?v=dUk5BkPfaww>); Why We Fight: How You Gonna Reform A Cop? (2006)(Available at: https://www.youtube.com/watch?v=I5zQbdaI_MY&t=8s); John Oliver monologue on police (June 8, 2020)(Available at: <https://www.youtube.com/watch?v=Wf4cea5oObY>); and Trevor Noah on George Floyd (May 29, 2020)(Available at: https://www.youtube.com/watch?v=v4amCfVbA_c).

⁸⁶ Erica Gunderson, Having ‘The Talk’: How Families Prepare Black Children for Police Interactions, (PBS-WTTW June 8, 2020)(Available at: <https://news.wttw.com/2020/06/08/having-talk-how-families-prepare-black-children-police-interactions>).

brother went to shoot baskets at a small park across the boulevard near his home. While playing basketball, a police car stopped by the park and after a short conversation about who they were, the police handcuffed his brother and took him away. The 8-year-old, frightened and fearing for his brother's safety ran home to tell his mother. It would take several hours before the family could reunite with his brother and secure his release. They were given a vague explanation that there had been burglaries in the neighborhood and the boy fit the description. The student subsequently learned that the boulevard they crossed marked an invisible boundary between a White and an integrated neighborhood. Although only a few hundred yards from their new home, they had inadvertently crossed a boundary into a place where they did not belong. The student described how the event changed his brother, his formerly outgoing, carefree companion became reclusive; less interested in leaving the house. He also talked about how the event changed him, as well as his lasting fear of interactions with police officers.

The Lesson portion of the Session again consisted of short presentations on the relationship between race and the criminal justice system. Professor Gildin and third-year student Parham Golestanian gave a joint presentation on "Testing the Tests" that examined "Stop and Frisk" practices of police departments and how the Fourth Amendment tests used by the Supreme Court to assess such stops fail to provide equal protection to citizens of all races. Professor Katherine Pearson, who earlier in her career was Chief of the Civil Rights Division for the city of Albuquerque, spoke of her experience representing police officers accused of civil rights violations and excessive force. She addressed the U.S. Department of Justice's investigation of the Albuquerque Police Department and the court-approved settlement that created an independent monitor of the police.

Retired Federal Judge Thomas Vanaskie posed the question of whether those who administer justice adequately reflect the communities they serve? He provided several personal accounts of Black defendants frustrated by a judicial process which, in their view, was unfairly and overwhelmingly White. He was followed by Professor Thomas Place who gave a presentation on how peremptory challenges in jury selection have, despite clear directives from the Supreme Court, persisted as a mechanism used by some prosecution offices to systematically exclude Blacks from juries. Professor Raff Donelson addressed the students on the use of fines and the disparate impact they have on minority communities, and third-year student Adriana Dunn examined the increasing use of forced labor in our mass incarceration system, particularly in privately run prisons. The Lesson segment of the evening concluded with 2L student Aaron

Holland reviewing the literature on the disparate impact of the death penalty and 3L student John Greiner summarizing the First Step Act of 2018.

During the small group discussions, students engaged each other in the important questions raised in The Lesson and were challenged to consider ways that they as lawyers could help improve the criminal justice system to make it more just.

The featured speaker for the Story and Vision segment was Mr. Brandon Flood, the Secretary of the Pennsylvania Board of Pardons. Prior to being appointed to the Board of Pardons, Secretary Flood was a legislative assistant and the Executive Director of the Pennsylvania Legislative Black Caucus. Much of his work focused on reforming our criminal justice system. He addressed the students on what he saw as the way to reform our criminal justice system. Flood included his own personal story in his remarks to the students. As a young man, he was arrested on drug and weapons charges on several occasions and spent over nine years as an incarcerated prisoner. He described his path from being a subject of our criminal justice system to one of our country's foremost advocates for reform.

Like other sessions, the Handout included essays authored by the students and faculty who gave presentations. The first item was a reprinted article from the New York Times that catalogued the many cases of deaths in police custody where the victims pleaded "I can't breathe."⁸⁷ It included a story about the increasing use of artificial intelligence and algorithms to identify offenders and their high error rate when used to identify Black perpetrators.⁸⁸ Professor Donelson contributed an essay on the disparate impact of cash bail. Also included was an excerpt from a report on the history of mass incarceration by the Brennan Center for Justice.⁸⁹

The Handouts and PowerPoints used in the course contain an image of Jack, an enslaved man. The image was taken by Joseph Zealy for a discredited eugenics study by Harvard Professor

⁸⁷ Mike Baker, Jennifer Valentino-DeVries, Manny Fernandez and Michael LaForgia, Three Words. 70 Cases. The Tragic History of 'I Can't Breathe', N.Y. TIMES (June 29, 2020). Available at: <https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html>.

⁸⁸ Kashmir Hill, Wrongfully Accused by an Algorithm, N.Y. TIMES (June 24, 2020). Available at: <https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html>.

⁸⁹ James Cullen, The History of Mass Incarceration, BRENNAN CENTER FOR JUSTICE (July 20, 2018). Available at: <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

Louis Agassiz. The image was chosen because of its high resolution that captures a dignified man staring directly into a camera used to objectify him. Professor Groome wrote an essay to place the image in context and to inform students what we know about Jack's life and Agassiz's racist study.

The Story and Vision portion of the Handout included an Op-ed written by former Dickinson Law professor Tiffany Jeffers – now at Georgetown Law. In the piece, Professor Jeffers talks about the conflicts she faces as a former prosecutor and law professor: “I find myself vacillating between two realities. First, recognizing that our legal system was built on the dehumanization of an entire race, making it incapable of ever achieving its true potential. Second, appreciating the brilliance and ingenuity of the American rule of law, and believing that if implemented with care, it can do more good than harm.”⁹⁰

Session 4: Race and Housing

The pre-session Playlist included a selection of podcasts and videos to help students prepare for the session.⁹¹ It also included links to music like Marvin Gaye's Inner City Blues: Make Me Wanna Holler.⁹²

⁹⁰ Prof. Tiffany Jeffers, Op-Ed: As a Black Female Law Professor, I'm Nurturing a System that Doesn't Protect People Like Me, U.S.A. TODAY (Nov. 4, 2020). Available at: <https://www.usatoday.com/story/opinion/policing/2020/11/04/black-female-law-professor-im-nurturing-system-abandons-me-column/6161526002/>.

⁹¹ Richard Rothstein, *The Color of Law, A 'Forgotten History' of How the U.S. Government Segregated America*, NPR Fresh Air (May 3, 2017), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>; A Conversation between Ta-Nehisi Coates and Richard Rothstein, C-SPAN (May 11, 2017), <https://www.c-span.org/video/?428341-1/the-color-law>; *Jim Crow of the North*, PBS Twin City's (Feb. 25, 2019), <https://www.youtube.com/watch?v=XWQfDbbQv9E>;

Orion Sun, *Lightning* (2020)(Available at: <https://www.cpr.org/2020/06/09/10-songs-that-tell-stories-of-the-black-experience/>); and Levittown, INSTAGRAM (video shared by 50cent on Dec. 16, 2020)(Available at: <https://www.instagram.com/tv/CI3GfBVHvwU/?igshid=1breveqlfv049>).

⁹² Marvin Gaye, *Inner City Blues (Make Me Wanna Holler)* (Tamla/Motown Records 1971). Available at: <https://www.youtube.com/watch?v=5qk1wBynjH4>.

To turn our attention to the issue, we played a short video produced by National Public Radio that told the story of housing segregation and redlining in America.⁹³ In the video, Gene Demby demonstrates how the National Housing Act of 1934 and the Home Owner's Loan Corporation established a system of segregated housing that still exists today.

In every session, we try to show the continuum between slavery and systems of inequality that are still in existence today. For this session, students Samantha Jacques and Deborah Osborn presented on the Freedman's Bureau and History of Public Housing respectively. Professor Sarah Williams gave a thought-provoking presentation on the Great Migration and imagining the tectonic shift in our political landscape that would occur if such a migration were to be reversed. Third-year student Jacob Kramer presented on the disparate impact of New Deal home ownership credits; Professor Alison Lintal brought the presentations into contemporary focus with a careful look at fair housing policy.

In the Lesson segments we also try to introduce students to the work of renown Black thinkers. In this session, 2L student Ryan Marr, summarized James Baldwin's work on the duality of the American legal system.

During the discussion groups we presented students with recent census data for Carlisle – Dickinson Law is located – and challenged them to develop a ten-year plan that would encourage greater integration of its neighborhoods and business districts. Feedback from the group indicated that this prompt precipitated a detailed discussion of presentations and engaged students in a forward-looking conversation about what was possible for the future.

Our featured speaker for the Story and Vision segment was Ms. Kate Walz, a senior staff attorney at the National Housing Law Project. Ms. Walz engages in high-impact litigation on issues related to housing inequality. Walz did a masterful job at dissecting the legal structures in Chicago responsible for building and maintaining a system of segregation. Chicago, divided into 50 wards administered by individual Aldermen, have largely unfettered power to control what happens in their ward through the principle of Aldermanic Prerogative. They can control whether or not existing affordable housing is built or maintained; can approve what types of housing can be built and decide where dangerous materials can be stored or disposed. Her presentation was a

⁹³ Gene Demby, *Housing Segregation and Redlining in America: A Short History*, NPR Code Switch (uploaded on Apr. 11, 2018)(Available at: <https://www.youtube.com/watch?v=O5FBJyqfoLM&feature=youtu.be>).

compelling example of how racially neutral laws can be crafted and used to create robust structures of racist policy.

Ms. Walz also offered students an inspiring personal reflection on how she sees her role as an attorney and framed the role of the lawyer as one of effecting social change in our country. She spoke about Movement Lawyering and how lawyers must see their work as greater than a single lawsuit or a single client:

It is about a radical commitment to advancing racial justice and dismantling systems of oppression. It requires lawyers to confront the legitimate fear in many communities that an attorney will dominate and control the outcome and replicate systems of subordination with which they already struggle and take away from that community their own power and ability to achieve their own success. Movements are led by those facing and most directly experiencing oppression and they are multi-dimensional – radical demands are welcome as are radical advocacy tools of which lawyers can help, support and develop.

For this session’s handout, in addition to a selection of essays and reprints on the issue of race and housing, we included reproductions of the deed for a home with a racial restriction and *Shelley v. Kraemer*, the Supreme Court case that rendered such restrictions unenforceable. The handout included an essay Isabel Wilkerson wrote for Smithsonian Magazine on the Great Migration,⁹⁴ an essay W.E.B. Du Bois wrote for The Atlantic in 1901 on the Freedman’s Bureau,⁹⁵ and an interesting piece on how New York’s efforts to integrate affordable and luxury accommodation in Manhattan has given rise to the phenomenon of the “Poor Door” – a separate entrance for less affluent and often Black and Brown residents to use.⁹⁶ The Handout ended with a report of an innovative program adopted by Evanston, Illinois to use revenue from the sale of

⁹⁴ Isabel Wilkerson, *The Long-Lasting Legacy of the Great Migration*, SMITHSONIAN MAG. (Sept. 2016). Available at: <https://www.smithsonianmag.com/history/long-lasting-legacy-great-migration-180960118/>.

⁹⁵ W. E. B. Du Bois, *The Freedmen’s Bureau*, THE ATLANTIC (March 1901).

⁹⁶ Mireya Navarro, ‘Poor Door’ in a New York Tower Opens a Fight Over Affordable Housing, N.Y. TIMES (Aug. 26, 2014). Available at: <https://www.nytimes.com/2014/08/27/nyregion/separate-entryways-for-new-york-condo-buyers-and-renters-create-an-affordable-housing-dilemma.html>.

marijuana to help create a reparation fund.⁹⁷ Finally, broadening our effort to introduce students to the work of Black scholars and thinkers we included a detailed obituary of Hank Aaron who died just prior to the session. The piece describes in detail, his life, his accomplishments, his struggle for racial equity and his great contribution to American life.⁹⁸

Session 5: Race and Health Care

The pre-session Playlist included a variety of podcasts and videos to introduce the long history of race and health care in the U.S. These ranged from a piece on the Tuskegee syphilis experiment⁹⁹ to modern race-based inequality in our health care system.¹⁰⁰

The Turning our Attention to the Issue segment was a CNN report on the death of Susan Moore, M.D., from Covid-19. Dr. Moore recorded biased treatment she received when she was hospitalized for Covid.¹⁰¹ Despite her protestations, she was denied care she knew as a doctor she needed. She was discharged only to be readmitted to a different hospital where she ultimately died.

During this, our fifth session, some first-year students in the class asked if they could begin participating in designing and delivering the program. We began The Lesson segment with a contribution by 1L student Shila Bayor on the impact of Covid-19 on Black and Brown communities. This was followed by Professor Emily Michiko Morris who gave a presentation on Race and Medical Research. Professor Morris sketched out the sad timeline of using Black

⁹⁷ Andy Fies, *Evanston, Illinois, finds innovative solution to funding reparations: Marijuana sales taxes*, ABC NEWS (Jul. 19, 2020). Available at: <https://abcnews.go.com/US/evanston-illinois-finds-innovative-solution-funding-reparations-marijuana/story?id=71826707>.

⁹⁸ David Waldstein, 'A Great Friend, a Great American and a Great Player,' N.Y. TIMES (Jan. 23, 2021).

⁹⁹ *The Tuskegee Syphilis Experiment*, U. of Minnesota Sch. of Pub. Health podcast (Dec. 8, 2020)(Available at: <https://www.youtube.com/watch?v=ATjKqB0cWqQ>).

¹⁰⁰ Christen Linke Young, *There are Clear, Race-Based Inequalities In Health Insurance and Health Outcomes*, BROOKINGS INSTITUTE (Feb. 19, 2020). Available at: <https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2020/02/19/there-are-clear-race-based-inequalities-in-health-insurance-and-health-outcomes/>.

¹⁰¹ Dakin Andone, *A Black doctor died of Covid-19 weeks after accusing hospital staff of racist treatment*, CNN (Dec. 25, 2020). Available at: <https://www.cnn.com/2020/12/24/us/black-doctor-susan-moore-covid-19/index.html>.

subjects in medical research in ways that were unethical. Professor Medha Makhoulf, who runs Dickinson Law's Medical-Legal Partnership, gave a presentation on the social determinants of health and how a range of structural inequalities contribute to disparate health outcomes. Third-year Parham Golestanian gathered the most current data to demonstrate the differential treatment of Blacks within our healthcare system.

Dickinson Law Alumni have asked to be involved in this program and Alumna Crystal Edwards, an experienced health law attorney, gave students a presentation on accessing health care through the Medicaid System. Finally, Professor William Wenner, who teaches Health Law, framed health care as a fundamental human right. He examined some of the international human rights conventions ratified by the U.S. to make the case that it has an international legal obligation to provide more comprehensive health care that is equally accessible to all Americans.

The small group prompt asked students to consider the relationship between Universal Health Care and Race. The prompt was from a book by the Featured Speaker for the session Dr. Khiara M. Bridges, a professor at UC Berkeley School of Law. Among Professor Bridges' scholarly works is her 2019 book entitled "Critical Race Theory: A Primer." Bridges challenged students to examine health care from the perspective of race. She recounted a study that she did in New York City in which she examined health care outcomes of two hospitals located within a few hundred feet of each other. One was public and underfunded, the other was private, well-funded and catered to patients with good health insurance. Both were in large part served by the same medical interns assigned to work in both hospitals. She posited that the significant difference in the health care outcomes between the two hospitals was attributable to the quantity and quality of each hospital's access to medical technology.

This session's Handout began with the story of the "disease" Drapetomania, posited by Dr. Samuel A. Cartwright in 1851. Cartwright claimed to have discovered the psychiatric disorder that made enslaved African-Americans want to escape slavery.¹⁰² Once again the Handout included essays by Dickinson Law students and faculty¹⁰³ as well as reprints of essays related to

¹⁰² Michael Coard, *Drapetomania: Compliant Blacks Sane, Resisting Blacks Insane*, THE PHILA. TRIB. (Mar. 2019).

¹⁰³ These contributions included: Prof. Medha D. Makhoulf, *Addressing Racism through Medical-Legal Partnerships*; Deborah Osborn, *Representation in the Healthcare Professions*; and Parham Golestanian,

race and our health care system.¹⁰⁴ The Handout contained the excerpt of a speech Dr. King gave to the American Medical Association in which he said: “We are concerned about the constant use of federal funds to support this most notorious expression of segregation. Of all the forms of inequality, injustice in health is the most shocking and the most inhuman because it often results in physical death.”¹⁰⁵

Differential Medical Treatment and Health Outcomes for Minority Groups and its Effects Amid a Pandemic.

¹⁰⁴ See e.g., Sheri Fink, *Dying of Covid in a ‘Separate and Unequal’ L.A. Hospital*, N.Y. TIMES (Feb. 8 2021); *Health Equity Considerations and Racial and Ethnic Minority Groups*, CDC (Jul. 24, 2020); and Valerie Kennedy, Blogpost, *Do Black Lives Matter to Big Pharma? – It’s Time for Companies to Confront Racial Bias in R&D and Health Care*, MEDIUM (June 21, 2020)(Available at: <https://medium.com/@kennedyesq516/do-black-lives-matter-to-big-pharma-9edf8c7aedd8>).

¹⁰⁵ Dr. Martin Luther King, Jr., *King Berates Medical Care Given Negroes*, OSHKOSH DAILY NORTHWESTERN (Mar. 26 1966).

Part V. Conclusion

Our task today is greater than we thought it last academic year. In this important period of our national history, our country requires of us, as legal educators, something that only we can provide: a generation of lawyers who will dismantle the remaining vestiges of systemic racism in our nation.¹⁰⁶ We must educate the next generation of lawyer to finish the job of rooting out systemic racism wherever it continues to live and breed. We must equip our students, not simply with the knowledge and skills they will need for this task, but with a sense of their place and role in our changing, imperfect, struggling democracy and the enduring passion they will need to sustain their efforts.

¹⁰⁶ Vernon Jordan wrote several years ago, “I am of the belief that in order to change a nation you must of course change hearts and minds, but you must also change the laws. And to change the laws you need good lawyers.” Vernon E. Jordan Jr., *A Celebration of Black Lawyers, Past and Present*, NEW YORKER (Jun. 7, 2017) <https://www.newyorker.com/news/news-desk/a-celebration-of-black-lawyers-past-and-present>